



State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES

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George Cairns and Sons, Inc.
4 Delta Drive, Suite C
Londonderry, NH 03053

**NOTICE OF PROPOSED
ADMINISTRATIVE FINE
No. AF 02-027**

August 12, 2002

I. INTRODUCTION

This Notice of Proposed Administrative Fine and Hearing is issued by the Department of Environmental Services, Water Division ("the Division") to George Cairns and Sons, Inc., pursuant to RSA 485-A:22 and Env-C 603.02. The Division is proposing that fines totaling \$6,500 be imposed against Cairns for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

II. PARTIES

1. The Department of Environmental Services, Water Division, is an administrative agency of the State of New Hampshire, having its principal office at 6 Hazen Drive, Concord, NH.
2. George Cairns and Sons, Inc. ("Cairns") is a Massachusetts corporation registered to do business in New Hampshire having a mailing address of 4 Delta Drive, Suite C, Londonderry, NH 03053.

III. SUMMARY OF FACTS AND LAW SUPPORTING CLAIMS

1. Pursuant to RSA 485-A:17, the Department of Environmental Services ("DES") regulates significant alteration of terrain and erosion control through a permit program. Pursuant to RSA 485-A:6, VIII, the Commissioner of DES has adopted Env-Ws 415 to implement this program.
2. Pursuant to RSA 485-A:22, V, the Commissioner is authorized to impose fines of up to \$2,000 per violation of, inter alia, RSA 485-A:17, Env-Ws 415, or any permit issued pursuant thereto. Pursuant to RSA 485-A:22, the Commissioner has adopted Env-C 603 to establish the schedule of fines for such violations.
3. Pursuant to RSA 485-A:17, I and III, any person proposing to significantly alter the characteristics of the terrain, in such a manner as to create an unnatural runoff shall be directly responsible to submit to DES detailed plans at least 30 days prior to undertaking such an activity. DES may exempt other state agencies from the permit and fee provisions of this section only if such agency has incorporated appropriate protective practices in its project which are substantially equivalent to the requirements established by DES under this chapter.
4. Env-Ws 415.02(y) defines significantly altering terrain to include disturbing more than 100,000 square feet of contiguous area.

5. Env- Ws 415(i) and (k) require employment of temporary and permanent methods for preventing soil erosion and controlling runoff.
6. Env-Ws 415.09(j) requires construction phasing and sequencing, including methods for limiting the length of exposure of unstabilized soils.
7. The New Hampshire Department of Transportation ("NH DOT") is the Contract Administrator for the construction of improvements to Route 293 and Brown Avenue, Manchester, New Hampshire, more specifically known as NHDOT Project # 12110-B (the "Project").
8. NH DOT contracted with Cairns to complete the Project.
9. On June 28, 2002, DES received two complaints alleging turbid water in the Merrimack River at the juncture of I-293 and Brown Avenue in Manchester. Based on these complaints DES personnel obtained water samples for measurement of turbidity levels at the point where sediment-laden runoff was discharging through a drainage culvert into the Merrimack River. The background turbidity sample, taken within the Merrimack River 25 feet upstream of the discharge point, measured 1.72 Nephelometric Turbidity Units ("NTUs"). The sample taken instream at the point of discharge was 86.0 NTUs, and 25 ft. downstream of the culvert turbidity was measured at 56.3 NTUs.
10. As part of the investigation of the source of the turbidity, DES personnel conducted a field inspection of the DOT construction site. The inspection revealed the following:
 - a) A drainage pipe adjacent to Brown Avenue had been punctured during work that was being conducted by Cairns. The drainage system in the vicinity of the puncture had become clogged with soil that had entered the system.
 - b) A drainage swale along the I-293 on-ramp at Brown Avenue was unstable in some areas and there was sediment deposited along the length of the swale. Turbid runoff was entering the drainage system.
11. During the June 28, 2002 inspection DES personnel spoke with Cairns Project Supervisor, John Jangro. Mr. Jangro indicated to DES personnel that it was his opinion that most of the turbidity was from runoff originating from Brown Ave. or was caused by residual sediment contained within the existing drainage system. Mr. Jangro said he was going to have the existing culverts cleaned out. He also indicated that he believed that the remainder of the drainage swale, constructed for treatment of surface water runoff on the Property, should be lined with riprap since the velocity of the water was too rapid to allow vegetation of the swale. The plans called for the swale to be vegetated and Mr. Jangro said he was awaiting permission from DOT to make the change. Mr. Jangro also informed DES that this was the second time that there had been drainage problems in that particular area of the Project.
12. On June 30, 2002 DES personnel met on-site with Ron Crickard, DOT Environmental Coordinator, Paul Nadeau, DOT Contract Administrator, John Jangro, Cairns Supervisor, and Costas Papachristos, Cairns Project Manager. At the meeting DES and DOT personnel recommended that accumulated sediment be removed from the drainage swale, the new drainage system be installed at the juncture of Brown Ave. and the I-293 on-ramp as part of this contract be

installed immediately, and the area stabilized to prevent further erosion. DES and DOT personnel agreed that the likely cause of sediment that entered the Merrimack River was not residual sediment in the drainage pipes, but the unstabilized soils on the work site and the failure of Cairns to install the new system as required on the construction plans, and as requested by the DOT Contract Administrator on previous occasions. Cairns had already started the construction of the new drainage system, and Messrs. Papachristos and Jangro agreed that the completion of this system was a top priority.

13. Pursuant to RSA 485-A:8, II, the Merrimack River is classified as a Class B surface water.

14. Pursuant to Env-Ws 1703.11(b), turbidity in Class B waters shall not exceed naturally occurring conditions by more than 10 NTUs.

15. RSA 485-A:13 states that it shall be unlawful for any person or persons to discharge or dispose of any sewage or waste to the surface or groundwater of the state without first obtaining a permit from DES.

16. Sediment-laden water constitutes waste as defined under RSA 485-A.

IV. VIOLATIONS ALLEGED AND PROPOSED ADMINISTRATIVE FINES

1. Cairns has violated RSA 485-A:17 by failing to install adequate erosion control measures resulting in water quality violations. For this violation, the Division is seeking a fine of \$1,000 pursuant to Env-C 603.02(d).

2. Cairns has violated RSA 485-A:13, I(a) by discharging waste into surface waters of the state without obtaining a permit from DES. For this violation, Env-C 603.05(a) authorizes a fine of \$2,000 per hour or portion thereof that the site was in violation. At this time, the Division is seeking a fine for only 2 hours, or \$4,000.

3. Cairns has violated RSA 485-A:17 by failing to construct new structures to prevent erosion of exposed soils resulting in water quality violations. For this violation, the Division is seeking a fine of \$1,500 pursuant to Env-C 603.02(i)(2).

The total fine being sought is \$6,500.

V. REQUIRED RESPONSE, OPPORTUNITY FOR HEARING

Pursuant to Env-C 601.06, you are required to respond to this notice. Please respond no later than September 12, 2002 using the enclosed colored form.

1. If Cairns would like to have a hearing, please sign the appearance section of the colored form and return it to the DES Legal Unit, as noted on the form. A Notice of Scheduled Hearing will be issued.

2. If Cairns chooses to waive the hearing and pay the proposed fine, please have the authorized representative sign the waiver (lower portion) and return it **with payment of the fine** to the DES Legal Unit.

3. If Cairns wishes to discuss the possibility of settling the case, please have the authorized representative sign the appearance and return it to the DES Legal Unit **and** call the DES Legal Unit to indicate Cairns' interest in settling.

Cairns is not required to be represented by an attorney. If Cairns chooses to be represented by an attorney, the attorney must file an appearance and, if a hearing is held, submit proposed findings of fact to the person conducting the hearing.

VI. DETERMINATION OF LIABILITY FOR ADMINISTRATIVE FINES

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that Cairns committed the violations alleged and that the total amount of fines sought is the appropriate amount under the applicable statute and rules. Proving something by a preponderance of the evidence means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that Cairns committed the violations and that the total amount of fines sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:

- * Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that Cairns proves, by a preponderance of the evidence,** applies in this case:

The violation was a one-time or non-continuing violation, **and** Cairns did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** Cairns did not benefit financially, whether directly or indirectly, from the violation.

2. At the time the violation was committed, Cairns was making a good faith effort to comply with the requirement that was violated.
3. Cairns has no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
4. Other information exists which is favorable to Cairns' case which was not known to the Division at the time the fine was proposed.

*******IMPORTANT NOTICE*******

An administrative fine hearing is a formal hearing. Any hearing will be tape recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that Cairns committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is Cairns's opportunity to present testimony and evidence that did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If Cairns has any evidence, such as photographs, business records or other documents, that Cairns believes show that Cairns did not commit the violation(s) or that otherwise support Cairns' position, should bring the evidence to the hearing. Cairns may also bring witnesses (other people) to the hearing to testify on Cairns' behalf.

If Cairns wishes to have an informal meeting to discuss the issues, Cairns must contact the DES Legal Unit at (603) 271-6330 to request a prehearing conference.

Information regarding this proposed fine may be made available to the public via the DES Web page (www.state.nh.us.des). If Cairns has any questions about this matter, please contact the DES Legal Unit, at (603) 271-6330.


COPY
Harry T. Stewart, P.E., Director
Water Division

Enclosure (*NHDES Fact Sheet #CO-2000*)

cc: Gretchen Rule, DES Legal Unit
Susan Alexant, DES Hearings and Rules Attorney
Gino Infascelli, DES Wetlands Bureau
Ron Crickard, NH DOT Environmental Coordinator
Paul Nadeau, NH DOT Contract Administrator
Jeff Albright, NH DOT
Ted Kitsis, Administrator, NH DOT Bureau of Construction
Frank Bauer, P.E., NH DOT District Engineer
Ridgely Mauck, DES Water Division
Ana Ford, DES Water Division